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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 267

CLAYTON B. HELLNER, ET AL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

(Filed July 10, 1964)

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, Clayton B. Hellner, Mrs. Katherine Robbins, widow of Gail S. Robbins, deceased,[1] Lisandro Ramirez, Herbert J. Davis, William J. Walsh, Herman J. Herzog, Fred S. Tutton, Douglas B. Bagnell, Tanner C. Dye and Fern Swartz, widow of Howard W. Swartz, deceased, pray that writs of certiori issue to review the judgments of the United States Court of Claims entered in the cases numbered, respectively, 15-60, 45-62, 85-61, 168-54, 419-61, 117-63, 271-63, 257-61, 228-61 and 322-55 on the records of said court.

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[1] On April 22, 1964, the Chief Justice granted the application of Clayton B. Hellner and Gail S. Robbins to extend the time for filing their petition to and including July 13, 1964. Gail S. Robbins died on June 19, 1964 and, under 10 U.S.C. Sec. 2771, his widow has succeeded to the ownership of his claim.

OPINIONS BELOW

There were no opinions in any of the ten cases with the exception of *Dye* (Appendix, pg. 31), merely summary orders of the court granting the government's motions to dismiss the petitions and denying petitioners' applications for rehearing. Typical orders are printed in Appendix pgs. 23-24. In these orders the court cited, collectively, *Lipp* v. *U.S.*, 301 F. 2d 674, (1962), cert. denied 373 U.S. 932; *Friedman, Executrix* v. *U.S.*, 310 F. 2d 381, (1962), *cert. denied* 373 U.S. 932; *Merriott* v. *U.S.*, Ct.Cl. No. 374-61, decided Nov. 15, 1963; and *Robinson* v. *U.S.*, Ct.Cl. No. 433-59, decided Nov. 15, 1963.

JURISDICTION

Judgments dismissing the petitions were entered as follows: *Hellner*, Nov. 15, 1963 (Hellner R 33);[2] *Robbins*, Nov. 22, 1963 (Robbins R 28); *Ramirez*, Nov. 15, 1963 (Ramirez R 34); *Davis*, Jan. 24, 1964 (Davis R 42); *Walsh*, Jan. 3, 1964 (Walsh R 34); *Herzog*, Feb. 28, 1964 (Herzog R 68-69); *Tutton*, May 1, 1964 (Tutton R 29); *Bagnell*, Jan. 24, 1964 (Bagnell R 57); *Dye*, June 12, 1964 (Dye R 56); *Swartz*, Nov. 27, 1963 (Swartz R 63).

Motions or applications for rehearing were denied as follows: *Hellner*, Feb. 14, 1964 (Hellner R 68); *Robbins*, March 13, 1964 (Robbins R 45); *Ramirez*, May 15, 1964 (Ramirez R 43); *Davis*, April 17, 1964 (Davis R 53); *Walsh*, April 17, 1964 (Walsh R 41); *Herzog*, Aug. 15, 1964 (Herzog R 73); *Bagnell*, April 17, 1964 (Bagnell R 62); *Swartz*, Jan. 24 and April 17, 1964 (Swartz R 30).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255(1). The review of these cases on cer-

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[2] "Hellner R 33" stands for page 33 of the certified transcript of the Court of Claims record in the *Hellner* case. The certified transcript of the record of each of the ten cases has been filed in this Court.

tiorari to the U.S. Court of Claims is sought in a single petition pursuant to Rule 23(5) of this Court.

THE QUESTIONS

(1) When Congress, in 1939, enacted a statute conferring disability retirement benefits upon officers in the non-Regular components of the Army of the United States in order to induce civilians to leave their occupations and professions to become such officers and to serve in the armed forces when needed for the defense of the United States, and

When such officers, at the time of their release from active military service, during or shortly after World War II, were permanently disabled due to disease or injury incurred in the service, but because of willful denial of their statutory rights or because of error as to their actual physical condition or the cause thereof, they were found, by military retiring boards and the Secretaries of the services, not entitled to retirement benefits, including disability retirement pay, and

When Congress, to enable such officers to realize their statutory rights, established two additional judicial boards within the services, in 1944 a disability review board, and in 1946 and 1951 a board for the correction of military records (also called correction board), and authorized such boards, in reviewing retiring board decisions, to consider the claims de novo, not only upon the evidence in existence at the time of the retiring board decisions, but upon evidence occurring thereafter, during the liberal period of time Congress provided for the presentation of the claims to the new boards, a minimum of 15 years from the enactment of the 1944 legislation creating the disability review board and of 10 years from the enactment of the 1951 legislation pertaining to the correction board, and

When the officers applied to the new boards within the period permitted by Congress and submitted to such boards substantial, material evidence which occurred after the decisions of the retiring boards and which demonstrated these decisions to have been erroneous and based upon incomplete or premature facts, and

When the new boards, arbitrarily and without due process of law, still denied the officers their statutory retirement benefits, and

When, having exhausted their judicial remedies in the military establishment, the officers, within 6 years after the decision of the final military board, the correction board, filed petitions in the United States Court of Claims, which possessed exclusive jurisdiction among the federal courts to award disability retirement pay, the statutory period of limitations governing suits in the Court of Claims being 6 years:

Should the court decline to exercise jurisdiction on the ground that the cause of action accrued at the time of the decision of the *initial* board, the retiring board (or at the time of a denial of an officer's request for a retiring board evaluation), and is barred because more than 6 years had elapsed from the time of that decision, or should the court entertain jurisdiction of these claims

(a) on the ground that they were not ripe for court action until the judicial remedies within the military establishment were exhausted, or

(b) on the ground that the correction board's arbitrary denial of the new statutory remedy constituted a cause of action for consideration by the court, or

(c) on the ground that the violation of due process by the correction board, depriving the officers of their new statutory remedy, constituted a cause of action for consideration by the court, or

(d) on the ground that the administrative action was not final until the new evidence which came into existence subsequent to the initial board decision was considered and acted upon?

(2) When the Court of Claims, on January 18, 1961, after 7 years of litigation of the issue of limitations, in at least 30 cases, unanimously held that the cause of action for disability retirement pay accrued upon the decision of the correction board and not upon previous decisions of either a retiring board or a disability review board, and in reliance upon the decision of the Court of Claims, disabled officers filed or prosecuted claims at substantial expense, was not the Court of Claims precluded, by the doctrine of stare decisis, from completely reversing itself on April 4, 1962, and thereafter summarily dismissing the petitions filed or prosecuted on the faith of the court's previous decision?

(3) When military disability retirement pay is payable, by statute, in monthly installments and when military or other governmental pay, payable in monthly or other periodic installments, has generally been held, by the Court of Claims and this Court, to be a continuing obligation giving rise to a new cause of action, for the purpose of the statute of limitations, whenever an installment became due, was there any justification for the Court of Claims to have departed from this general rule and to have deprived the disabled officers of their entire lifetime annuity instead of the portion which had accrued more than six years prior to the filing of their petitions?

STATUTES INVOLVED

1. 28 U.S.C. § 2501 (Supp. 1963), Statute of Limitations for the Court of Claims as amended Sept. 3, 1954, 68 Stat. 1246, Appendix, pg. 25.

2. 10 U.S.C. § 456 (1946), the Act of April 3, 1939, 53 Stat. 557, conferring disability retirement benefits upon non-Regular Army officers, Appendix, pg. 25.

3. 10 U.S.C. § 961-965 (1952), R. S. § 1246-1250, providing for Army retiring boards, Appendix, pgs. 25-26.

4. 38 U.S.C. § 693i (1946), Sec. 302 of the Servicemen's Readjustment Act of June 22, 1944, 58 Stat. 284, 287, now 10 U.S.C. § 1554, providing for disability review boards in the military services, Appendix, pg. 27.

5. 5 U.S.C. § 191a (1954), the Act of Oct. 25, 1951, 65 Stat. 655, now 10 U.S.C. 1552, providing for boards for the correction of military records, Appendix, pg. 28.

6. 10 U.S.C. § 861 (1952), R. S. § 1268, providing for military officers' pay in monthly installments, Appendix, pg. 29.

7. 38 U.S.C. Sec. 693h (1946), Sec. 301 of the Servicemen's Readjustment Act of June 22, 1944, 58 Stat. 286, now 10 U.S.C. Sec. 1553, providing for discharge review boards in the military services, Appendix, pg. 29.

STATEMENT

The petitioners, officers of the non-Regular components of the Army of the United States, were seriously incapacitated in the military service.[3]

[3] *Hellner* sustained severe head, spinal and internal injuries in a staff car accident and was hospitalized in the service for 27 months (Hellner R 1, 3, 4, 43-44). *Robbins* was the victim of a notoriously defective yellow fever serum, administered by the Army, which caused a serious liver disease, portal cirrhosis, and his death (Robbins R 1-4, 6, 16). *Ramirez* incurred arterial hypertension (Ramirez R 1, 2, 5). *Davis* sustained an aggravated pilonidal cyst, hypertrophic arthritis and bilateral inguinal herniae (Davis R 2, 3, 24). *Walsh* suffered a traumatic paralysis of the ulnar nerve and atrophy of the right arm, hypertensive vascular disease, multiple strictures and chronic severe prostatitis (Walsh R 2). *Herzog* sustained a chronic peptic ulcer, severe impairment of hearing, moderate arthritis and prostatic infection (Herzog R 2-5, 6, 9, 31-36). *Tutton* became almost totally deaf because of pressure injuries to

By reason of their disabilities, they sued in the United States Court of Claims to recover retirement pay under the Act of April 3, 1939, 53 Stat. 557, 10 U.S.C. § 456 (1946), Appendix, pg. 25), which Congress had passed as an inducement to them, as civilians, to interrupt the pursuit of their occupations and professions for service in the defense of the United States.

The Court of Claims has exclusive jurisdiction, among the federal courts (28 U.S.C. Secs. 1491, 1346(d)(2)), to render judgment for disability retirement pay under the Act of April 3, 1939. In the cases at bar, however, it declined to exercise jurisdiction on the ground that the petitions were filed more than six years (the period of limitation under 28 U.S.C. § 2501, Appendix, pg. 25) after the adverse decision of the initial statutory board, the retiring board, although within six years of the decisions of higher boards established by Congress to consider these claims, the disability review board (38 U.S.C. Sec. 693i (1946) Appendix, pg. 27) and the board for the correction of military records (5 U.S.C. Sec. 191a (1954) Appendix, pg. 28).

Under the 1939 and related statutes, officers were entitled to disability retirement pay if they were permanently incapacitated for active service by injury or disease incurred in line of duty. To determine these facts, Congress had established, within the military services, a hierarchy of three boards with judicial powers. The initial board, the retiring board, had been established long prior to World War II (10 U.S.C. Secs. 961-965 (1952), R. S. Secs. 1246-1250, Appendix pgs. 25-26). Because of wide-

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his ears in high altitude flying (Tutton R 2, 4, 9, 10). *Bagnell* incurred heart disease (Bagnell R 5, 35). *Dye* received a deep bacterial infection which caused diseases of the eye (iritis, iridocyclitis and uveitis), prostatitis, arthritis and hepatitis. He was hospitalized in the Army approximately 19 months (Dye R 2, 6). *Swartz* sustained a spinal injury, a herniated nucleus pulposus (Swartz R 4, 10).

spread complaints of illegal deprivation of the rights of non-Regular officers (See Hearings on H. Res. 141 and H. Res. 447, 80th Congress, before Legal Subcommittee of Armed Services Committee, House of Representatives, 1948, hereinafter called "1948 Congressional Hearings," pg. 171.) the disability review board, sometimes called the retiring review board, was created in 1944 (Sec. 302 of the Servicemen's Readjustment Act of June 22, 1944, the "G.I. Bill of Rights," 58 Stat. 287, 38 U.S.C. Sec. 693i (1946), now 10 U.S.C. Sec. 1554, Appendix, pg. 27). Finally, to correct and remove these and other "errors and injustices," in the language of the statute, the board for the correction of military records was established by the Legislative Reorganization Act of 1946, as amended by the Act of October 25, 1951, 65 Stat. 655, 5 U.S.C. Sec. 191a (1954), now 10 U.S.C. Sec. 1552, Appendix, pg. 28. This was the final board. It considered applications only after all other administrative remedies were exhausted (Army Regulation 15-185, 15 July 1955, Par. 8). The decision of each of the boards was subject to the approval or disapproval of the Secretaries of the services.

Congress provided liberal periods of time for military personnel to apply to these new boards. Applications to the disability review board could be filed within 15 years after the date of the officer's release from active service or from the effective date of the act, June 22, 1944, whichever was later (38 U.S.C. Sec. 693i (1946), Appendix, pg. 27). Presentation of claims to the correction board was authorized up to 10 years after the Act of October 25, 1951, or 3 years from claimant's discovery of his claim, whichever was later (5 U.S.C. Sec. 191a (1954), Appendix, pg. 28).

Prior to their release or shortly thereafter, each of the petitioners, with the exception of Dye and Swartz, had appeared before a retiring board whose findings were

adverse, either on the ground that he was not permanently incapacitated for active service (Hellner R 3, 1948; Davis R 24, 1945; Walsh R 3, 1946; Herzog R 2, 1948; Tutton R 3, 1946;) or that, if he were incapacitated, the disability had not been incurred in line of duty (Robbins R 4, 1946; Ramirez R 5, 1947; Bagnell R 3, 34-35, 1945; Davis R 24, 1945). The requests of Dye and Swartz for a retiring board evaluation were denied by their commanding officers on the ground that they were not permanently incapacitated for active service (Dye R 1, 1947; Swartz R 3, 1948).

The decisions of the retiring boards were shown to be erroneous by substantial evidence which subsequently came into existence. In some cases, disabilities did not improve as boards expected and were found to be permanent (Hellner R 17-18, 20, 22, 39, 41; Walsh R 4-5, 25, 36). Diagnoses were proven to have been wrong by discovery of the cause of disability during surgery (Herzog R 7, 47-49, 71; Swartz R 28, Supp. R 14; Robbins R 5-6) or by the lapse of time and additional medical evaluation (Bagnell R 4, 37-39; Davis R 30, 35; Tutton R 5, 9; Herzog R 7, 47-49, 71; Robbins R 7, 16, 17, 29, 37; Dye R 26-27, 51). New evidence, obtained by civilian counsel, demonstrated board findings to have been plainly erroneous (Ramirez R 6, 22, 27).

It was precisely because of such errors made during the hasty demobilization and physical evaluation of millions of enlisted men and officers after World War II and because of the repeated charges of discrimination and willful violation of the rights of non-Regular officers that Congress, during the period 1944-1951, established the new boards to which the disabled officers could apply for relief.[4]

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[4] 1948 Congressional Hearings, supra, pgs. 5-12, 72, 85, 90, 117, 120-121, 133, 143, 161-162, 168-169, 176, 206, 263, 289, 296-304, 403; Report of Investigation of Physical Disability Retirement of

Some of the petitioners filed claims, where appropriate, with the disability review board and, after denial, with the correction board (Robbins R 7; Ramirez R 6; Davis R 4; Tutton R 4, 19; Bagnell R 3, 40). The others, whose claims were not cognizable by the disability review board, applied directly to the correction board (Hellner R 11; Walsh R 3; Herzog R 7, 46, 47; Dye R 5; Swartz R 4). The claims were presented within the time permitted by statute.

All petitioners filed suit in the Court of Claims within 6 years, the limitations period for that court (28 U.S.C. Sec. 2501 (Supp. 1963), Appendix, pg. 25). The court dismissed the petitions and overruled applications for rehearings on the basis of its decisions in *Lipp, Friedman, Executrix, Robinson* and *Merriott*, supra.[2] In these cases the court held that the claim accrued for action in the court at the time of the initial retiring board decision or of the denial of a request for a retiring board evaluation, which had taken place prior to the 6 year period, and not at the time of the decision of the final board, the correction board, notwithstanding the following facts alleged by the petitioners:

(1) The correction board had before it substantial evidence which had come into existence subsequent to the initial decision and which clearly showed the decision was erroneous or premature (Hellner R 17-18, 20, 22, 39, 41; Robbins R 5-6, 16, 17, 29, 37; Herzog R 7, 47-49, 71; Swartz R 2, 8, Supp. R 14; Bagnell R 4, 37-39, 50, 59; Davis R 30, 35; Tutton R 5, 9; Dye R 26-27, 51; Ramirez R 6, 22, 27).

Army, Navy and Marine Corps, Legal Subcommittee, H. Comm. on Armed Services, 80th Congress, pgs. 6021, 6032-34; S. Report No. 1081, 81st Cong., first session, S. Armed Services Comm.; Hearings before S. Comm. on Armed Services re H.R. 4767, 81st Cong., pg. 41.

[2] Hellner R 33, 68; Robbins R 28, 45; Ramirez R 34, 45; Davis R 42, 53; Walsh R 34, 41; Herzog R 68, 73; Tutton R 29; Bagnell R 57, 62; Swartz R 25, 30; Dye, R 56.

(2) The decisions of the retiring boards were, in some cases, reversed by subsequent board action and, in contemplation of law, never existed (Davis R 23, 31, 47; Tutton R 4-6, 20-21; Bagnell R 3).

(3) The retiring board decision was tentative, not final, because the board, not certain that the officer's physical condition had stabilized, provided for a future re-evaluation (Walsh R 3, 20, 35).

(4) The decision of the retiring board was fatally defective by reason of fundamental procedural irregularities (Hellner R 3, 4, 38; see Davis R 29-31, 35, 47).

(5) The proceedings of the final board were so violative of due process that the petitioners were deprived of the remedy which Congress had given them to overcome the previous erroneous or arbitrary action. This unlawful deprivation of their statutory remedy constituted an independent cause of action which the court should review. These due process violations consisted of:

(a) Deciding the claims not upon evidence before the board, but upon ex parte, advisory opinions of the Surgeon General which were contrary to the evidence, violative of the regulations and which the petitioners were never permitted to examine, comment upon or refute (Hellner R 22, 41-42; Walsh R 36; Bagnell R 5, 40-41, 57; Dye R 6, 8-10, 28).

(b) Denying the petitioners a hearing in violation of the regulations governing the board (Hellner R 3; Robbins R 7; Ramirez R 7; Walsh R 6; Bagnell R 5, 41-46).

(c) Abdicating to the military the board's statutory judicial function as a board composed solely of civilians (Hellner R 42; Ramirez R 30; Walsh R 36; Herzog R 8, 31, 57-59; Dye R 31-32).

(d) Deciding the claims without the participation of the Secretary, mandatory under the statute (5 U.S.C. Sec. 191a (1954), Appendix, pg. 28).

(e) Completely ignoring regulations which required findings favorable to the petitioners and acting beyond and outside of the law as if the board had complete, uncontrolled discretion and was not bound by regulations or law (Robbins R 32, 38-39).

(f) Failing to obtain material evidence which the petitioner specifically requested and deciding the claim without advising the petitioner that it had not obtained or considered the evidence (Hellner R 18, 23, 42).

The Court of Claims held that none of the aforesaid facts either deprived the retiring board decision of finality[6] or showed that the administrative consideration of the claim was not final until the exhaustion of all board reviews and de novo considerations or that the correction board action, however arbitrary on the evidence or violative of due process in its procedures, constituted a cause for action by the court.[7]

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[6] In *Friedman, Executrix*, supra, the court spelled out, at page 384, "the rules we shall now follow". One of the rules emphasized by the court was that the cause of action would *not* accrue if the decision of the retiring board was not "final" and that the decision was not final when (page 396):

> "(i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality."

The court, nevertheless, held in the cases at bar, that the retiring board decision was final, even though it was tentative; or when subsequent to the retiring board decision, substantial new evidence occurred which showed the decision to be erroneous, which had never been considered by the retiring board and which was presented to and acted upon, by the correction board; or when the retiring board decision was voided by a reversal of a review board; or when it was void by reason of a denial of due process.

[7] No other interpretation of the court's rulings is possible inasmuch as the court denied every request of the petitioners to present the aforesaid facts to the court either in the form of amendment to the petitions which had been framed on the basis of *Knight* (Hellner R 34, 68; Robbins R 29, 43, 45; Davis R 43, 53;

In *Knight* v. *U.S.*, 152 Ct.Cl. 298, decided on Jan. 18, 1961, a unanimous court (Madden J. who delivered the opinion, Durfee J., Laramore J., Whitaker J., and Jones C.J.), after seven years of litigation of the issue of limitations in over thirty disability retirement cases (cited in *Friedman, Executrix*, supra, fn. 8, pg. 388), held that the 6 year period began to run at the time of the decision of the final board, the board for correction of military records, notwithstanding earlier decisions of retiring and review boards. After such full and prolonged consideration of the issue, it was felt that the question had been finally decided and laid to rest. In reliance on the decision, many of the petitioners expanded substantial sums of money in either filing or prosecuting their claims (Petitions filed in reliance on *Knight* and prior to *Lipp*: Robbins R 1; Ramirez R 1; Walsh R 1; Bagnell R 1; Dye R 1. Evidence collected for trial in reliance on *Knight* and prior to *Lipp*: Ramirez R 21, 35-36. Trials conducted at great expense in reliance on *Knight* and prior to *Lipp*: Hellner R 16, trials at Tampa, Dallas, San Antonio and Washington; Davis R 21, at Philadelphia and Los Angeles).

It was, therefore, a matter of great surprise and consternation to the petitioners to find that they were rejected by the only impartial tribunal with jurisdiction to award disability retirement pay about 14 months after they had been assured of their day in court.

Walsh R 29, 37); or in the form of findings by commissioners upon evidence already presented to them (Hellner R 16-17, 18, 35; Davis R 43-44) or to be presented to them (Ramirez R 25, 30, 37; Herzog R 71; Dye R 49; Swartz R 31). After the court denied all requests of petitioners to present evidence of the aforesaid facts, the petitioners asked the court to clarify its rulings and state the grounds thereof, but it again refused (Hellner R 48, 68; Robbins R 43; Ramirez R 30, 37; Walsh R 29, 37; Herzog R 71; Dye R 49), presumably because the court believed the facts immaterial, as it stated in *Dye*, Appendix pg. 32).

REASONS FOR GRANTING WRIT

The right to judicial review of military decisions is of importance to a large segment of our population. There are 23 million veterans and, with universal military service, the military now touches the life of almost every male citizen. Members of the armed services have found the administrative remedies provided by Congress unavailing and have turned increasingly to the courts, with claims such as those at bar or involving the legality of discharge from the service (Meador, "Judicial Determination of Military Status," 72 Yale L.J. 1294, 1963).

The question, therefore, as to when the federal courts should exercise jurisdiction over military claims is of increasing importance. The decisions of the Court of Claims that the claim becomes ripe for court action in the midst of the administrative proceedings is in conflict not only with the principles announced by this Court in *Gusick* v. *Schilder*, 340 U.S. 128, and *U.S.* v. *Sing Tuck*, 194 U.S. 161, but with decisions of several circuit courts of appeal and federal district courts (*Michaelson* v. *Herren*, 242 F.2d 693 (1957) and *Burns* v. *McCrary*, 229 F.2d 286 in the Second Circuit; *Reed* v. *Franke*, 297 F.2d 171 (1961) in the Fourth Circuit; *Anderson* v. *MacKenzie*, 306 F.2d 248 (1962) in the Ninth Circuit; *Hunter* v. *Beets*, 180 F.2d 101 (1950), in the Tenth Circuit; *Bolger* v. *Marshall*, 193 F.2d 37 (1957) in the District of Columbia Circuit; *Randolph* v. *U.S.*, 69 F. Supp. 156 (1946), District Court of the S. District of Texas, cited with approval in *Uhley* v. *U.S.*, 128 F. Supp. 674, 129 Ct.Cl. 608 (1954); *Hooper* v. *Hartman*, 163 F. Supp. 437 (1958), District Court of the S. Dist. of California).

Thus, *Michaelson* v. *Herren*, *Reed* v. *Franke* and *Bolger* v. *Marshall*, supra, held that the federal court will not exercise jurisdiction to determine the validity of an unsatisfactory military discharge when the plaintiff had not exhausted his remedy before the discharge review board

(38 U.S.C. Sec. 693h (1946), Appendix, pg. 29), a twin of the disability review board (38 U.S.C. Sec. 693i (1946), Appendix, pg. 27). These two boards were created by consecutive sections of the same statute, Sections 301 and 302 of the Servicemen's Readjustment Act of June 22, 1944, the first to review discharges, the second to review releases for disability without retirement benefits. The statutory provisions as to each board are essentially the same (Appendix, pgs. 27, 29) and the principles applicable to court review are the same (see Meador, Judicial Determinations of Military Status, 72 Yale L.J. 1294, (1963)).

Reed v. *Franke*, supra, held that the correction board remedy should be exhausted before the court exercises jurisdiction on the yalidity of a discharge. *Randolph* v. *U.S.*, supra, held similarly with respect to disability retirement.

Anderson v. *MacKenzie*, supra, held that the court should not exercise jurisdiction over a discharge until a military field board had reviewed the matter. In *Hooper* v. *Hartman*, supra, it was held that jurisdiction over dismissal should not be entertained prior to exhaustion of the plaintiff's remedy in the U.S. Court of Military Appeals. *Burns* v. *McCrary*, supra, held that a suit to enjoin a reduction in grade of a civilian, non-veteran employe of the Army should not be entertained until an appeal to the Secretary of the Army was exhausted.

The requirement of exhaustion of military remedies was likewise applied in *Hunter* v. *Beets* and *Gusick* v. *Schilder*, supra, which held that, in habeas corpus proceedings, the courts should not exercise jurisdiction until all administrative remedies in the military departments were utilized, including new remedies enacted after court martial conviction and even after the petition for the writ had been filed.

The only reported decision not conflicting with those of the Court of Claims is *Ogden* v. *Zuchert*, 298 F.2d 312 (1961) in the District of Columbia Circuit which reversed the decision of the district court that the correction board remedy should be exhausted in a disability retirement claim.

The *rationale* of the decisions requiring exhaustion of all remedies within the military establishment is stated by this Court in *Gusick* v. *Schilder*, supra, at pg. 132:

> "If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by a federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is as well served whether the remedy which is available was existent at the time resort was made to the federal courts or was subsequently created, as indeed is implicit in cases from a federal court whose review we denied pending exhaustion of a newly created state remedy."

The foregoing decisions merely apply the general rule that when administrative review is provided, it, as well as the initial remedy, must be exhausted (Davis, Administrative Law, 1951, pg. 639).

The Court of Claims decisions conflict not only with those of other federal courts, but with the court's own decision in *Knight* v. *U.S.*, supra, and with statements made by it in previous decisions (*Eicks* v. *U.S.*, 172 F. Supp. 445, 145 Ct. Cl. 522 (1959); *Prince* v. *U.S.*, 119 F. Supp. 421, 127 Ct. Cl. 612 (1954); *Friedman* v. *U.S.*, 158 F. Supp. 364, 141 Ct. Cl. 239 (1958); *Rosnick* v. *U.S.*, 132 F. Supp. 478, 132 Ct. Cl. 1, 6 (1955).

The supervisory powers of this Court should be exercised to correct the extraordinary departure of the Court of Claims from the doctrine of stare decisis, aptly defined as the "protection of generated expectations" (Harlan, J., in *Glidden* v. *Zdanok* 370 U.S. 530, 543), and generally considered inflexible in matters of jurisdiction.

The reversal of *Knight* by *Lipp* constitutes a direct conflict with *Marshall* v. *B & O R.R. Co.*, 16 How. (U.S.) 314, (1853), in which this Court said (at page 324):

> "There are no cases, where an adherence to the maxim of 'stare decisis' is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of the courts. For this reason alone, even if the court were now of the opinion that the principles affirmed in the case just mentioned and that of the Bank of Deveaux, 5 Cranch 61, were not founded on right reason, we should not be justified in overruling them. The practice founded on those decisions, to say the least, injures or wrongs no man; while their reversal could not fail to work wrong or injury to many."

Equally unusual is the court's departure from the general doctrine of continuing obligations under which periodic installments of salary or other obligations constitute separate causes of action. Disability retirement pay is, by statute, payable monthly (10 U.S.C. Sec. 861 (1952), R. S. Sec. 1268, Appendix, pg. 29), but the court held, contrary, to its own decisions (*Hermann* v. *U.S.*, 81 F. Supp. 830, 113 Ct. Cl. 54 (1949); *Sagers* v. *U.S.*, 102 Ct. Cl. 791 (1945); *Morris* v. *U.S.*, Ct. Cl. 324-61, Nov. 15, 1963, and the decisions of this Court (*U.S.* v. *Ellsworth*, 101 U.S. 70; *U.S.* v. *Watson*, 130 U.S. 80; *U.S.* v. *Moser*, 266 U.S. 236) that it is not a continuing obligation. Commenting upon this holding, Madden, J., in *Odell* v. *U.S.*, 139 F. Supp. 749, 751, 134 Ct. Cl. 634, 642 (1956), stated:

> "In recent years we have, in a few cases, departed from this orthodox and correct rule. The results, in

> some cases strikingly unjust, should have put us on our guard, but did not. In *Hunter Louis Girault* v. *U.S.*, No. 50474, decided November 8, 1955, we found that the action of the Secretary of War was 'clearly contrary to law,' yet we allowed his illegal action to deprive a soldier of his legal rights for the rest of his life. Such an unworthy end is not a reason for inventing a novel and unorthodox legal doctrine . . . I can imagine no reason why soldiers should be selected as sacrifical offerings to nourish a novel legal doctrine."

Since the Court of Claims did not state the grounds of its rulings in the cases at bar and refused to clarify them (supra, fn. 7, pgs. 12-13), the court decided, either that the petitioners' allegations (supra, pgs. 11-12) were insufficient to demonstrate a lack of due process in the military tribunals or if they were sufficient, a violation of due process would not constitute a new cause of action for review by the court.

If the court decided that the facts alleged did not constitute a violation of due process, the decisions would conflict directly with *Gonzales* v. *United States*, 348 U.S. 407, in which this Court stated that an ex parte, advisory opinion obtained from the Department of Justice by a draft appeal board on the question of exemption from military service violated "underlying concepts of procedural regularity and basic fair play." (See also Sec. 7 of the Administrative Procedure Act, 5 U.S.C. 1006.) The court's decisions would also conflict with *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959) in which this Court, in considering the validity of a discharge by the Department of Interior, held the department was guilty of a fatal procedural irregularity when it did not abide by its own regulations, citing *Service* v. *Dulles*, 354 U.S. 363.

If the court decided that a violation of due process, which deprived the petitioners of their correction board remedy, did not constitute a cause of action for review by

the court, the decisions were directly contrary to the intent of Congress that the court should review such correction board rulings, so clearly demonstrated in *Friedman* v. *U.S.*, 158 F. Supp. 364, 141 Ct. Cl. 239, 1958.

The decisions of the court in the cases at bar (and in others which have suffered the same fate*) constitute a gross injustice to perhaps our most deserving citizens, officers disabled in the military service. The statute enacted by Congress to induce them to leave their occupations and professions to serve in the defense of their country has been completely subverted. Their right to disability retirement pay, conferred by the statute, has arbitrarily been denied them. The additional remedies within the military services enacted by Congress to enable them to realize their right have been equally unavailing. Because they pursued these remedies within the generous periods of time provided by Congress, they have been penalized by losing the opportunity to present their claims to an impartial tribunal.

Under the *Knight* decision all disabled officers were on an equal footing with respect to their right to present their claims to the Court of Claims. The *Lipp* and subsequent decisions created the following serious and unfair inequalities with respect to this right, so important to the officers because of the negligible prospects of success before the military boards:

(1) An officer, released in 1946 *without* a retiring board evaluation, who applied to the correction board as late as October 25, 1961, could file a timely petition in the court at any time within 6 years after the correction board ruled on his claim. He could file his petition in 1967, or even later if the board ruled subsequent to 1961 (Harper v. U.S., 310 F.2d 405, 1962). On the other hand,

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* In *Lipp*, the court stated, referring to orders such as those in the instant cases, "There are a large number of comparable orders" (Fn. 1, Appendix, pg. 32).

an officer released in 1946 *with* a retiring board evaluation could file no later than 1952. The first officer had 21 or more years after release; the other, 6 years (Hellner et al).

During the mass demobilization of 1944-1946, whether or not an officer was sent before a retiring board depended upon so many uncertain, variable and unpredictable factors that it is unreasonable and unjust to make such an event the determinant of the life of this right of action.

Was he in or near a hospital that had a retiring board; how busy was the board at that particular hospital and how long would it take to process him; how anxious he was to go home; how competent were the medical officer who examined him at separation centers or hospitals and who decided whether he should be evaluated by a retiring board; how busy were they; how long were the "production lines" of officers awaiting separation; how anxious were the doctors and retiring board personnel to go home; how rapidly were they being demobilized?

The Court reasoned that the individual who had been ordered before a retiring board ordinarily had enough notice of potential entitlement to disability retirement to be required to sue, within 6 years, whereas the one who had not been sent to a retiring board had no such notice. It is apparent, however, that the individual who was informed, after the examinations and studies required in processing him to a retiring board, that he was not really incapacitated, was more thoroughly misled into believing that he had no incapacity, in spite of his symptoms, than the one who was not examined at all. The latter was more likely, after release, to consult a private physician or the Veterans Administration to ascertain what was wrong than was the former, who had been given a clean bill of health by an apparently thorough checkup, including hospitalization, disposition board and retiring board proceedings.

(2) The Court held that if the retiring board decision was "tentative" because it was not certain of the permanency of the disability and it recommended a subsequent physical reevaluation, its decision was not final and the statute of limitations did not begin to run (*Friedman, Executrix*, supra, at pg. 391). In many cases the retiring boards knew that their decisions were tentative because not enough time had elapsed to ascertain the permanence of the disability, but they failed, for various reasons, to recommend a reevaluation. They may not have been aware of the procedure (There were 99 retiring boards in the Army, many of whom were inexperienced, 1948 Congressional Hearings, supra, pgs. 10, 12.). The Boards were prohibited from recommending a reevaluation at a date later than 6 months (War Dept. Technical Manual, TM 12-245, 1 October 1945, Par 16, pg. 22) which, in many cases, was too short a time for the disability to stabilize. Futhermore, many individuals could not have been expected to return to an Army hospital in so short a time after reentering civilian life.

(3) The court held that when the armed services itself recognized a mistake in a previous board evaluation and reopened the matter, the previous decision was not final (*Friedman, Executrix, supra*, at pg. 391; Schiffman v. U.S., 319 F.2d 886, decided July 12, 1963. See however, Swartz R 27, 30, 31, 34, Supp. R 7 in which the court refused to recognize that the service reopened the claim *even though the government admitted it had.*). If, however, the same mistake was made and not initially recognized by the service, but brought to its attention by the claimant, and the proceedings were reopened, the statute, nevertheless, ran from the time of the earlier decision (Dye, Appendix pg. 36; Robinson v. U.S., supra, slip. op., pg. 3).

Both claimants had been prejudiced by a mistake but one was given more than six years to rectify the error in court; the other was not.

In holding that a board did not reopen the matter when it considered material evidence which occurred subsequent to the retiring board decision, the court was in conflict with the rationale of this Court in *Roberston* v. *Chambers*, 341 U.S. 37 (1951). It was held, in Robertson, that such evidence was competent for consideration by the disability review board. The Court reasoned that the evidence was important to arrive at a correct determination of the nature and extent of the officer's disability at the time of his release; that Congress had given the review board the power to consider the claims de novo (not merely to reverse for error); and that when Congress allowed 15 years after a retiring board decision for the consideration of the matter by the review board, the intervening evidence was obviously material. The Solicitor General had argued in his brief that the evidence was of prime importance because of the Government's long, contingent liability. Robertson, in effect, decided that the review board was actually given the power to reopen the matter so as to rule upon the subsequent evidence. The same principle would apply to the correction board which was also authorized to consider these matters after considerable periods of time and was given the power to try them de novo.

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

PAUL R. HARMEL
Attorney for Petitioners

Of Counsel:

GEIGER, HARMEL & SCHUCHAT

APPENDIX

Order of the court granting defendant's motion to dismiss plaintiff's petition and dismissing petition.

IN THE UNITED STATES COURT OF CLAIMS

No. 85-61

LISANDRO RAMIREZ

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion to dismiss the petition filed on May 28, 1962. Upon consideration thereof, together with the opposition thereto, oral argument of counsel and the briefs of the parties, it is concluded, on the basis of *Lipp* v. *United States*, No. 384-58, decided April 4, 1962, and *Friedman, Executrix* v. *United States*, No. 377-60, decided November 7, 1962, *cert. denied* May 27, 1963, in *Lipp and Friedman*, 373 U.S. 932, that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C. § 2501, and

IT IS ORDERED this 15th day of November, 1963, that defendant's motion be and the same is granted, and plaintiff's petition is dismissed.

BY THE COURT,

s Marvin Jones
MARVIN JONES,
Chief Judge.

Order of the court denying plaintiff's application for rehearing.

IN THE UNITED STATES COURT OF CLAIMS

No. 85-61

LISANDRO RAMIREZ

v.

THE UNITED STATES

ORDER

This case comes before the court on plaintiff's application for rehearing of defendant's motion to dismiss under Rule 68 of the Rules of this court. Upon consideration thereof, together with the opposition thereto, and on the basis of *Merriott* v. *United States*, No. 374-61, and *Robinson* v. *United States*, No. 433-59, both decided November 15, 1963, and similar cases,

IT IS ORDERED this fifteenth day of May, 1964, that plaintiff's said application be and the same is denied.

BY THE COURT,

/s/ Marvin Jones
MARVIN JONES,
Chief Judge.

28 U.S.C. § 2501 (Supp. 1963)

TIME FOR FILING SUIT

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues (as amended Sept. 3, 1954, c. 1263, § 52, 68 Stat. 1246).

10 U.S.C. Sec. 456 (1946), 53 Stat. 557
The Act of April 3, 1939

AN ACT

To provide more effectively for the national defense by carrying out the recommendations of the President in his message of January 12, 1939, to the Congress.

Provided further, That all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government, for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army.

10 U.S.C. Secs. 961-965 (1952)
R. S. Secs. 1246-1250

RETIRING BOARDS

§ 961 *Composition of board.*

The Secretary of the Army, under the direction of the President, shall, from time to time, assemble an Army

retiring board, consisting of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board, excepting the officers selected from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of. (R. S. § 1246; July 26, 1947, ch. 343, title II, § 205 (a), 61 Stat. 501.)

§ 962. *Oath of members of board.*

The members of said board shall be sworn in every case to discharge their duties honestly and impartially. (R. S. § 1247.)

§ 963. *Inquiry into and determination of facts.*

A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose. (R. S. § 1248.)

§ 964. *Finding cause of incapacity.*

When the board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, has produced his incapacity, and whether such cause is an incident of service. (R. S. § 1249.)

§ 965. *Revision by President.*

The proceedings and decision of the board shall be transmitted to the Secretary of the Army, and shall be laid by him before the President for his approval or disapproval and orders in the case. (R. S. § 1250; July 26, 1947, ch. 343, title II, § 205 (a), 61 Stat. 501.)

38 U.S.C. Sec. 693i (1946) **Now 10 U.S.C. Sec. 1554**
The Servicemen's Readjustment Act of
June 22, 1944, Sec. 302, 58 Stat. 287

DISABILITY OF REVIEW BOARD

(a) The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released to inactive service, without pay, for physical disability pursuant to the decision of a retiring board, the findings and decision of such retiring board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the retiring board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of the retiring board shall be transmitted to the Secretary of War, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after the effective date of this Act, whichever is the later.

(c) As used in this section—

(1) the term "officer" means any officer subject to the laws granting retirement for active service in the Army, Navy, Marine Corps, or Coast Guard, or any of their respective components;

(2) the term "counsel" shall have the same meaning as when used in section 301 of this Act.

5 U.S.C. Sec. 191a (1954)
The Act of Oct. 25, 1951, 65 Stat. 655
Now 10 U.S.C. Sec. 1552

BOARDS FOR CORRECTIONS OF MILITARY RECORDS

The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and correction so made shall be final and conclusive on all officers of the Government except when procured by means of fraud: Provided, That procedures set up by the Secretaries of the Army, Navy, and Air Force in accordance with this subsection shall be approved by the Secretary of Defense; Provided further, That no corrective action shall be taken under this subsection unless the request therefor be filed by claimant, his heirs at law, or legal representatives within three years after his or their discovery of the alleged error or injustice, or within ten years after the date of enactment of this section, whichever be the later: Provided further, That the failure to file the request by claimant, his heirs at law, or legal representative, within three years after his or their discovery of the alleged error or injustice may be excused by such board of civilian officers or employees of the re-

spective Departments upon finding by it that it is in the interest of justice to excuse such failure to file within the prescribed time in which event action shall be taken in the same manners as if the request had been filed within the three years as prescribed herein.

10 U.S.C. § 861 (1952)
R.S. § 1268

ARMY OFFICERS' PAY

§ 861. *Officers to be paid monthly.*

The sums allowed to officers for pay, rental allowances, and subsistence shall be paid in monthly payments. (R. S. § 1268.)

38 U.S.C. Sec. 693h (1946)
Now 10 U.S.C. Sec. 1553
The Servicemen's Readjustment Act of June 22, 1944, Sec. 301, 58 Stat. 286

DISCHARGE REVIEW BOARD

The Secretary of War and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the War and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court marital. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in

person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided*, that the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200 of the Act of June 29, 1936 (Public Law Numbered 844, Seventy-fourth Congress). Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are hereby amended to authorize the Secretary of War and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of War or the Secretary of the Navy, respectively: *Provided*, That no request for review by such board of a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after the effective date of this Act whichever be the later.

IN THE UNITED STATES COURT OF CLAIMS

No. 228-61

(Decided June 12, 1964)

TANNER C. DYE

v.

THE UNITED STATES

Paul R. Harmel for plaintiff. *Geiger, Harmel & Schuchat* of counsel.

Edgar H. Twine, with whom was Assistant Attorney General *John W. Douglas*, for defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO REMAND PROCEEDINGS TO THE COMMISSIONER

PER CURIAM: This is a military disability-retirement pay case in which the defendant has moved for summary judgment on the ground that the claim is barred by the 6-year statute of limitations, 28 U.S.C. § 2501. This motion was referred to Trial Commissioner Marion T. Bennett, under former Rule 37(e) (now Rule 54(b)), for his recommendation for a conclusion of law. Commissioner Bennett has submitted an opinion concluding

that the claim is barred by limitations, and a recommendation that the defendant's motion be granted and the petition dismissed. Oral argument before the court has been had, and the court has considered the briefs filed by the parties, as well as the motion to remand filed by the plaintiff after the Commissioner submitted his opinion and recommended conclusion.

The court agrees with the Commissioner's recommendation and with his opinion. Subsequent to the filing (on November 12, 1963) of that opinion and recommended conclusion, the court handed down a number of opinions and orders deciding the identical or similar limitations issues in the same way and on the same grounds. See, *e.g.*, *Robinson* v. *United States*, Ct. Cl. No. 433-59, decided November 15, 1963; *Merriott* v. *United States*, Ct. Cl. No. 374-61, decided November 15, 1963; *Teitelbaum* v. *United States*, Ct. Cl. No. 116-63, decided Jan. 24, 1964, rehearing denied April 17, 1964 (orders).[1] The Commissioner's opinion is in accord with those opinions and orders. The court therefore adopts his opinion, as supplemented by the later decisions, as the basis for judgment in this case. The court has considered the factual allegations contained in plaintiff's motion to remand to the Commissioner but, on the basis of the cited decisions and the Commissioner's opinion, holds those allegations immaterial on the issue of limitations; the motion is therefore denied.

The defendant's motion for summary judgment is granted and the plaintiff's motion to remand to the Commissioner is denied. The petition is dismissed.

OPINION OF COMMISSIONER

Defendant seeks summary judgment grounded on the statute of limitations to defeat plaintiff's claim for disability retirement pay.

[1] There are a large number of comparable orders.

Plaintiff first performed military service during World War I. From 1922 to December 22, 1940, he served in the Missouri National Guard. On December 23, 1940, he entered active duty as a major in the Infantry and performed active duty until June 10, 1947, during which period he was promoted to the rank of lieutenant colonel. On June 10, 1947, he was released from active duty by reason of demobilization and on August 21, 1956, was retired for longevity.

On August 1, 1946, plaintiff appeared before an Army disposition board at the O'Reilly General Hospital, Springfield, Missouri. That board found plaintiff had the following disability: "Enlarged prostrate; inflammation of left eye with possibility of recurrence." It recommended that plaintiff "be returned to permanent limited duty."

On March 24, 1947, plaintiff appeared before a second disposition board at Madigan General Hospital, Tacoma, Washington. That board found plaintiff was suffering from "[i]ntermittent inflammation of left eye, with possibility of recurrance, enlarged and tender liver." It recommended that he "be returned to duty for *general military service with waiver of physical defect.* Iridocyclitis. Hepatitis."

On May 11, 1947, plaintiff, in a letter to the Adjutant General, requested that he be allowed to appear before an Army retiring board. By letter dated June 12, 1947, the Adjutant General, by order of the Secretary of War, informed plaintiff that his request to appear before an Army retiring board was denied. That letter stated in part:

> 2. Your entire record, including your letter, has been carefully reviewed in the War Department. However, the latest evidence in the record reveals no physical defect warranting your appearance before an Army Retiring Board. The evidence in the record indicates that the findings of the Disposition Board

which met in your case at Madigan General Hospital, Tacoma, Washington on 24 March 1947, are correct. Therefore, your request is not favorably considered.

On March 16, 1960, plaintiff filed an application with the Army Board for Correction of Military Records requesting that his records be corrected to show he was permanently incapacitated for active duty at the time of his release on June 10, 1947. After a hearing and receipt of evidence from plaintiff, the Correction Board concluded on May 2, 1961, that plaintiff was not permanently incapacitated for active service at the time of his release on June 10, 1947.

Defendant contends plaintiff's claim accrued on June 12, 1947, when his request to appear before an Army retiring board was refused by order of the Secretary of War. This date was almost 14 years prior to the filing of his petition on June 9, 1961. It is contended the claim is barred by the 6-year statute of limitations (28 U.S.C. 2501).

A claim for disability retirement accrued on final action of a board competent to pass on eligibility for disability retirement. *Friedman* v. *United States*, Ct. Cl. No. 377-60, decided November 7, 1962, 310 F.2d 381, *cert. denied*, 373 U.S. 932 (1963). A refusal of a request for such a board constitutes final action. *Friedman*, *supra*, slip op., p. 20; *Lipp* v. *United States*, Ct. Cl. No. 384-58, decided April 4, 1962, 301 F.2d 674, *cert. denied*, 373 U.S. 932 (1963).

Plaintiff contends, however, that the denial of his request for a retiring board was erroneous and therefore lacked finality. It is alleged that the denial was erroneous and illegal because (1) the Adjutant General said that plaintiff's record had been carefully reviewed "in the War Department" when, in fact, it had not been in the Adjutant General's possession; (2) the denial was based on mistakes made by the March 24, 1946, Madigan disposition board which (a) ignored plaintiff's prostatitis

and arthritis that had previously been found, and considered the hepatitis nondisabling, (b) had no authority to change plaintiff's status for the purpose of separation when a prior board had found him fit only for limited service, (c) recommended waiver for plaintiff's iridocyclitis and hepatitis and considered plaintiff's prostatitis cured by operations and ignored his symptoms of arthritis, (d) ignored Army regulations that required plaintiff to be sent before an Army retiring board, (e) ignored regulations that authorized waivers only for the purpose of permitting critically needed personnel, who could not qualify physically for general service, to serve on active duty—not for the purpose of separation, (f) ignored Army regulations that permitted waivers of minor disabilities which were not disqualifying for full military duty and would not progress nor become aggravated by active military service, and (g) used waivers improperly to deprive disabled officers of retirement benefits; and, finally, (3) the Correction Board accepted an *ex parte* opinion about plaintiff's condition from the Surgeon General and this opinion was full of factual and legal errors.

Upon the foregoing allegations as to lack of finality in the administrative proceedings, plaintiff's petition filed July 9, 1961, seeks disability retirement pay from June 10, 1947, the date of release from active duty.

Plaintiff's argument that the alleged errors would deprive the denial of finality is grounded on the discussion by the court on pages 12 and 13 of the *Friedman* opinion. At the point the court indicated that action of the initial board considering a disability claim might be deprived of finality under certain circumstances. See, also, *Friedman*, *supra*, slip op., p. 21; *Braun* v. *United States*, Ct. Cl. No. 68-62, decided October 11, 1963, slip op., p. 3.

Plaintiff contends the facts pleaded here, particularly with respect to the erroneous use of the waiver technique, are similar to those in *Capps* v. *United States*, 133 Ct. Cl.

811, 137 F. Supp. 721 (1956); *Loeb* v. *United States*, 133 Ct. Cl. 937 (1956); and *Schiffman* v. *United States*, Ct. Cl. No. 548-59, decided July 12, 1963. In those cases, however, the circumstance which deprived the initial board decision of finality was the reopening of the matter by the Armed Services. *Suter* v. *United States*, 139 Ct. Cl. 466 (1957), *cert. denied*, 355 U.S. 926, and *Weiner* v. *United States*, 148 Ct. Cl. 445 (1960), likewise do not support plaintiff's position. In its discussion of those cases, the court, in *Friedman*, *supra*, p. 13, suggested that the erroneous refusal to grant a retiring board in those cases deferred the accrual of the claim. In *Suter* and *Weiner* it was held the initial action of the boards lacked finality because they did not purport to make a final decision. Further, when the claimants were subsequently refused requests for further retirement boards it was because it was erroneously believed that the Armed Services had no authority to grant them. This belief was based on the Comptroller General's opinion of April 25, 1951 (30 Comp. Gen. 409), holding that the Armed Services had no authority to award retirement pay to persons disabled in active service but released prior to a determination being made of their right to receive such pay. That ruling was subsequently invalidated by this court in *Updike* v. *United States*, 132 Ct. Cl. 627, 132 F. Supp. 957 (1955).

On the other hand, the refusal to grant plaintiff here a retiring board was not based on a mistake as to the authority of the Services to grant such a board, but rather on a decision that the evidence of record did not warrant a retiring board.

It should also be noted that in the *Suter* and *Weiner* cases the only action which could arguably have barred the claims was that of the original board, since the erroneous refusals to grant a further board occurred in both cases within the 6-year period prior to the time of filing suit.

In view of the clear holding in *Lipp* and in *Friedman* that the refusal to grant a retiring board is a final action upon which a claim accrues, there appears to be no authority for plaintiff's proposition that the refusal to grant him a retiring board lacked finality because it was erroneous.

The allegations about the errors in the decisions of the Secretary and of the Correction Board are really not material to the issue to be decided here. If the erroneousness of the decision of the Secretary of War in denying plaintiff's request to appear before a retiring board could destroy its finality, then the bar of the statute of limitations could always be defeated by a plaintiff simply proving his case on the merits. Had plaintiff brought suit within 6 years of June 12, 1947, he would have been required to show that he was disabled and should have been allowed to appear before a retiring board. The only claims that would be barred by the statute of limitations, under plaintiff's theory, would be those without merit. Dismissal of a claim because of the bar of limitations would be synonymous with dismissal on the merits. But, as the Court of Claims stated in *Friedman* v. *United States*, *supra*, slip op., p. 24, "* * * it is inherent in all statutes of limitations that claims otherwise justifiable and justiciable will be denied because suit is not brought in time." Erroneous or not, the decision of the Secretary was final on its face. Time within which to file suit started running when that decision was made. Plaintiff cannot now defeat application of the statute of limitations by a belated argument that the administrative decision was erroneous.

The only action occurring within 6 years of the date plaintiff's petition was filed was the Correction Board's denial on May 2, 1961, of plaintiff's application to it in 1960 for relief. Plaintiff contends that this action of the board created a new cause of action. It is alleged that the

board abdicated its statutory function by relying wholly on the opinion of the Surgeon General, which opinion itself failed to follow the governing regulations and was erroneous in law and fact.

The only authority for this position appears to be a statement by the court in footnote 10 of the *Friedman* opinion, *supra*, slip op., p. 12, reading in part:

> * * * Or it may be that, since the court [in *Frederick* v. *United States*, No. 111-56, decided July 15, 1960] stressed the irregularities in the Correction Board's *procedures*, it thought that those irregularities in procedure (rather than the arbitrariness of the substantive determination) created a new cause of action on which the plaintiff could recover.

It appears quite clear, however, that the above language was merely a speculation by the court on the rationale of *Frederick* v. *United States*, 150 Ct. Cl. 769 (1960), a case which it declined to treat as a "hard or full precedent." The above language would, therefore, appear to provide no support to plaintiff's contention that the action of the Correction Board created a new cause of action. This is particularly true when the language is viewed in the light of the holding in *Friedman*, "that where, as in the *Lipp* type of case, the Correction Board is in effect reviewing a prior adverse determination by a Retiring Board or the Disability Review Board (or a refusal to convene such a board), the Correction Board's adverse decision does not give rise to a new cause of action." *Friedman*, *supra*, slip op., p. 21.

It is concluded that plaintiff's claim accrued on June 12, 1947, more than 6 years before the filing of his petition on June 9, 1961, and that no new cause of action was created by the adverse decision of the Correction Board.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 267

CLAYTON B. HELLNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims in *Dye* v. *United States,* Ct. Cl. No. 228–61 (Pet. 31), is not yet reported. The other nine related cases were decided without opinion.

JURISDICTION

The judgments of the Court of Claims were issued in *Hellner* and *Ramirez,* November 15, 1963; *Robbins,* November 22, 1963; *Swartz,* November 27, 1963; *Walsh,* January 3, 1964; *Bagnell* and *Davis,* January 24, 1964; *Herzog,* February 28, 1964; *Tutton,* May 1, 1964; and *Dye,* June 12, 1964. Motions for rehearing

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were denied in *Swartz*, January 24 and April 17, 1964;[1] *Hellner*, February 14, 1964; *Robbins*, March 13, 1964; *Davis*, *Walsh*, and *Bagnell*, April 17, 1964; *Ramirez* and *Herzog*, May 15, 1964. On April 22, 1964, the Chief Justice granted an extension of time for filing of petitions to and including July 13, 1964, in *Hellner* and *Robbins*. The petition for a writ of certiorari was filed on July 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Whether the Court of Claims correctly ruled that petitioners' claims for military disability retirement pay were barred by the statute of limitations (28 U.S.C. 2501) because the suits were filed either more than six years after the requests for the convening of Army retiring boards were refused or more than six years from the adverse decisions of retiring boards which were convened.

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[1] Insofar as it relates to *Swartz*, the petition is untimely. The petition in *Swartz* was filed more than 90 days after denial of the first motion for rehearing. Consequently, the petition was timely only if the second motion for rehearing was itself timely filed. See *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498. The second motion for reconsideration was filed under Rules 68 and 69 (formerly Rules 53 and 54) of the Rules of the Court of Claims. Rule 68 permits the filing of such motions only within 30 days of the entry of judgment. Rule 69, which allows motions to set aside a judgment for mistake, excusable neglect, newly discovered evidence, and the like, specifically does not affect the finality of the judgment. While the petition is timely insofar as it seeks review of the denial of the motion, so considered the only issues properly before the Court are those relating to the propriety of the motion not the correctness of the original judgment which petitioner Swartz is in fact challenging.

STATUTE INVOLVED

Section 2501 of Title 28 of the United States Code provides in pertinent part:

> Time for filing suit.
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners, former officers in the United States Army, seek review of decisions of the Court of Claims dismissing their suits to recover military disability retirement pay on the ground that the action was barred by the six-year limitation period established for that court by 28 U.S.C. 2501.

The *Dye* case is illustrative of the facts in the ten cases. Petitioner Dye requested in May 1947 that he be allowed to appear before an Army retiring board; this request was denied in June 1947, on the ground that the record revealed no incapacitating physical defect.[2] In March 1960, almost thirteen years after he had been refused a retiring board, Dye filed an application with the Army Board for Correction of Military Records, which, in May 1961, after a hearing,[3] concluded, as had the retiring board, that Dye was not permanently incapacitated for active service at

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[2] In some of the cases, the retiring board heard but denied the claim.

[3] In some of the other cases, the Board of Correction denied an application for correction of the record without granting a hearing, ruling that insufficient evidence had been presented to indicate probable error by the retiring board.

the time of his release. In June 1961, he filed a petition in the Court of Claims, which was held to be barred by the six-year statute of limitations (Pet. App. 33–34).

ARGUMENT

In holding the present suits barred by the six-year limitation prescribed by 28 U.S.C. 2501 the court below correctly applied settled principles of law to the circumstances of each case. The rulings do not conflict with decisions of this or any other court. Accordingly, no question is presented meriting review by this Court.

1. Petitioners urge that decisions by retiring boards as a matter of law are not "final" because they are subject to review by disability review boards and the Board of Correction. The contentions raised by petitioners were given thorough consideration by the Court of Claims in 1962, and were rejected in *Friedman* v. *United States*, 310 F. 2d 381, certiorari denied, 373 U.S. 932. In that decision, the Court of Claims set forth clear standards for the application of its statute of limitations to military retirement cases, which standards it has followed consistently. *E.g.*, *Braun* v. *United States*, Ct. Cl. No. 68–62, decided October 11, 1963; *Merriott* v. *United States*, Ct. Cl. No. 374–61, decided November 15, 1963; *Robinson* v. *United States*, Ct. Cl. No. 433–59, decided November 15, 1963; *Grubin* v. *United States*, Ct. Cl. No. 167–60, decided June 12, 1964. In *Friedman*, the Court of Claims held (310 F. 2d at 395–396):

> *Summary:* As our discussion has shown, the main course of the court's decisions on the

time-bar in the disability retirement field reveals a well-structured design:

(a). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on *final* action of a board competent to pay upon eligibility for disability retirement (or upon refusal of a request for such a board).

(b). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).

(c). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

(d). Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(e). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(f). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but

> accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

As the Court of Claims concluded, the action of the retiring boards, unless there is some indication by the board to the contrary, is final. Their actions were a definite determination as to disability, after which a petition could have been filed in the Court of Claims during the ensuing six years without going to the Board of Correction. But petitioners allowed the adverse action of the retiring boards to stand without challenge.

If a cause of action accrues upon the action or inaction of the retiring board, it follows *a fortiori* that the denial of relief by a disability review board or the Board of Correction would not start anew the running of the statute of limitations. The basic wrong which the claimant alleges lies in the decision of the retiring board and the later action merely constituted the failure of a board to rectify this wrong. A different result would allow any claimant to extend the period during which he could petition the Court of Claims simply by filing an application with the Board of Correction.

The principles laid down by the Court of Claims in *Friedman* are, contrary to petitioners' suggestion (Pet. 14–16), fully consistent with the long line of cases requiring exhaustion of administrative remedies before court relief may be obtained. Such cases hold only that court proceedings cannot be instituted until a "final"

administrative determination has been made.[4] Because review by a Board of Correction is discretionary rather than mandatory and because the decision by the retiring board, or the refusal to convene a retiring board, is not merely a recommendation to another tribunal, but a conclusive evaluation of the case, the Court of Claims has concluded that the action of the retiring board is the point in time at which the claimant's cause of action normally accrues.[5] The only court other than the Court of Claims which has had occasion to consider this question also concluded that no application to a Board of Correction is necessary in order

[4] The cases relied upon by petitioners clearly were ones in which no finality could be attributed to the last administrative decision prior to the bringing of the court action. For example, in *Anderson* v. *MacKenzie*, 306 F. 2d 248 (C.A. 9), plaintiff's discharge from the service was being held in abeyance pending a further administrative hearing when suit was brought one day before the administrative hearing was scheduled. *Burns* v. *McCrary*, 229 F. 2d 286 (C.A. 2), was a case in which plaintiff appealed an administrative ruling to the Secretary of the Army almost immediately upon the rendering of the ruling, and sought court relief while the appeal was pending. *Gusik* v. *Schilder*, 340 U.S. 128, and *Hunter* v. *Beets*, 180 F. 2d 101 (C.A. 10), deal with the prerequisites for the issuance of the extraordinary writ of habeas corpus, and consequently do not decide the question of the finality of any particular administrative remedy. *Reed* v. *Franke*, 297 F. 2d 17 (C.A. 4), holds only that a serviceman's discharge is not procedurally unconstitutional when a full hearing is provided after discharge.

[5] When there has been no evaluation by the retiring board of any kind, such as when no request for review is made to it, the cause of action accrues upon decision of the disability review board or the Board of Correction. *Harper* v. *United States*, 310 F. 2d 405 (Ct. Cl.).

for a cause of action to accrue. *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A. D.C.).*

2. Petitioners also contend that, even if the decisions of retiring boards are normally final, they were not so in these cases because (1) the boards themselves had indicated that their decisions were tentative; (2) a disability review board or the Board of Correction had reopened the case; or (3) the Board of Correction followed invalid procedures. Thus, assuming that the *Friedman* decision is correct, petitioners claim that they come within its terms since the facts show that the standards set forth in *Friedman* were misapplied here. However, the determination of such issues of fact as whether in the particular case the holding of the retiring board was not intended to be final or whether a disability review board or the Board of Correction had re-opened a case does not merit review by this Court.

As to whether the Board of Correction in some of these cases followed improper procedures, this is plainly not an issue for the Court of Claims even assuming that the Board's procedures are subject to judicial review in a federal court. Once, as in these cases, the statute of limitations has run on the underlying disability claim, the claimant no longer has an action within the jurisdiction of the Court of Claims; that court is restricted to the consideration of claims for compensation.

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* In addition, one other court of appeals has cited the *Friedman* case with approval. *Christian Beacon* v. *United States*, 322 F. 2d 312 (C.A. 3).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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